Supreme Court, U.S.
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95-351

No.

In The

Supreme Court of the United States

October Term, 1995

KNOX COUNTY BOARD OF EDUCATION,

Petitioner,

vs.

RAYMOND RYNES, by his parent and next friend, DEBORAH RYNES and DEBORAH RYNES, Individually,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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Contents *Page*

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES i

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 4

ARGUMENT 6

CONCLUSION 10

TABLE OF AUTHORITIES

Cases Cited:

Brown v. Griggsville Community Unit School Dist. No. 4, 12 F. 3d 681 (7th Cir. 1993) 5, 6, 7

Farrar v. Hobby, 506 U.S. _____, 113 S. Ct. 566, 121 L.Ed.2d 494 (1992) 4, 5, 6, 8

Krichinsky v. Knox County Schools, 963 F. 2d 847, 850 (6th Cir. 1992) 9

Statutes Cited:

20 U.S.C. § 1400, et seq. 3

Contents *Page*

20 U.S.C. § 1415(b)(2) 5, 8

20 U.S.C. § 1415(e) (2) 8

20 U.S.C. §1415(e)(4)(B) 3

42 U.S.C. § 1988 9

Other Authorities Cited:

34 C.F.R. § 300.343 7

34 C.F.R. § 300.344(a) 7

Sen. Rep. No. 99-372, 99th Cong., 1st Sess. 2 (1986) ... 10

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. 20 U.S.C. § 1415(b)(2) (Procedural Safeguards)

(b) Required procedures; hearing

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

B. 20 U.S.C. § 1415(e)(2)

(e) Civil action; jurisdiction

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

C. 20 U.S.C. § 1415(e)(4)(B)(Civil action; jurisdiction; attorney fees):

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

D. 34 C.F.R. § 300.343 (Meetings)

(a) General
Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising the IEP of a child with a disability (or, if consistent with State policy and at the discretion of the LEA, and with the concurrence of the parents, an individualized family service plan described in section 677(d) of the Act for each child with a disability, aged 3 through 5).
(b) [Reserved]
(c) Timeline
A meeting to develop an IEP for a child must be held within 30 calendar days of a determination that the child needs special education and related services.
(d) Review
Each public agency shall initiate and conduct meetings to review each child's IEP periodically and, if appropriate, revise its provisions. A meeting must be held for this purpose at least once a year.

E. 34 C.F.R. § 300.344(a) (Participants in meetings)
(a) General
The public agency shall ensure that each meeting includes the following participants:
(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.
(2) The child's teacher.

(3) One or both of the child's parents, subject to Sec. 300.345.
(4) The child, if appropriate.
(5) Other individuals at the discretion of the parent or agency.

STATEMENT OF THE CASE

Plaintiffs/respondents disagree with the Statement of the Case in the Petition and submit the following additional statement. (The terms "plaintiffs" and "defendant" will be used to refer to the parties).

The case arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400, et seq. The original issue was whether Raymond Rynes, a deaf child, would attend Tennessee School for the Deaf (TSD) or a Knox County school. This issue was resolved in favor of the plaintiffs in an agreed order. District Court Memorandum and Order at Ptr. App. 5. The only issue remaining is whether the plaintiff/parent is the "prevailing party" within the meaning of 20 U.S.C. §1415(e)(4)(B).

The District Court found that litigation between the parties began in 1990 when the defendant decided to place Raymond in a school other than TSD. Prior to that time, the defendant had continuously placed Raymond at TSD. Plaintiffs requested a due process hearing. That proceeding was concluded by the entry of an agreed order which allowed Raymond to attend TSD. District Court Memorandum and Order at Ptr. App. 6.

In 1991, defendant again attempted to force Raymond to leave TSD. This resulted in a second due process hearing, in which the Judge ruled in favor of the defendant on the placement issue but ordered modifications of the program offered by the defendant. Final Order of the Tennessee State Department of Education at Ptr. App. 13.

Plaintiffs appealed to the United States District Court for the Eastern District of Tennessee. In the District Court, an agreed order was entered which provided that Raymond would continue his education at TSD. District Court Memorandum and Order at Ptr. App. 5. This was precisely the relief on the

merits which plaintiffs sought.

Defendant's decision to settle the case by allowing Raymond to attend TSD, came during a private discussion among members of its staff. Plaintiffs were not advised of the meeting and obviously did not attend.

The District Court held:

> "There is no doubt what the plaintiffs hoped to achieve by requesting a hearing and then appealing the findings of the ALJ was for continued placement at TSD for Raymond. This result has been achieved ...". District Court Memorandum and Order at Ptr. App. 9.

The District Court found the parent to be the "prevailing party" and awarded attorneys' fees. Judgment of the District Court at Ptr. App. 3.

Defendant appealed the attorneys' fee award. The Court of Appeals for the Sixth Circuit affirmed the decision of the District Court, from the bench, without a written opinion. Order of the United States Court of Appeals for the Sixth Circuit filed June 1, 1995, at Ptr. App. 1. The defendant filed a Petition for Re-Hearing and Suggestion for Re-Hearing *En Banc*, which was overruled. Order of the United States Court of Appeals for the Sixth Circuit filed July 7, 1995 at Ptr. App. 27.

SUMMARY OF ARGUMENT

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IS CORRECT AND THIS CASE MEETS NONE OF THE CRITERIA ESTABLISHED BY THIS COURT FOR THE GRANTING OF A WRIT OF CERTIORARI.

This Court has recently issued a thorough, comprehensive opinion governing attorney fee litigation. *Farrar v. Hobby*, 506

U.S. _____, 113 S.Ct. 566, 121 L.Ed. 2d 494 (1992). The fact that the instant case has no importance as a precedent is emphasized by the fact that the Court of Appeals decided it without writing an opinion. The parent/plaintiff in this case clearly meets the criteria of *Farrar*, and no additional issues are present beyond those decided in *Farrar*.

Defendant purports to demonstrate a conflict between the instant case and *Brown v. Griggsville Community Unit School Dist. No. 4*, 12 F.3d 681 (7th Cir. 1993). This case is distinguishable from *Brown* on a number of grounds. In *Brown*, the case was resolved before a hearing, at a meeting of the child's IEP team, causing the parents to withdraw their request for a hearing. This case was resolved by entry of an agreed order in the District Court, after litigation in a due process hearing and in the District Court. Also, in this case, the settlement did not take place at a meeting of the child's IEP team. This case is also distinguishable from *Brown* upon other factual grounds.

The plaintiffs took the only option available to them to contest the defendant's proposed placement of the child. They followed the procedure set out in the Individuals with Disabilities Education Act. 20 U.S.C. Sec. 1415(b)(2). They achieved the relief they sought in the District Court.

The decisions of the District Court and the Court of Appeals are correct. Holding to the contrary would require the conclusion that a parent who contests a decision of school authorities, and goes through extended litigation, only to have the authorities simply change position during the litigation, would be denied attorneys fees. Such a decision would shift the tremendous cost of attorneys' fees and litigation to a victorious parent through no fault of the parent. Such a conclusion is contrary to established precedent, and common sense. It also would create a chilling effect upon parents who disagreed with decisions of school authorities. It would mean that poor parents who could not afford to pay attorneys' fees could not afford to exercise their rights under the Individuals with Disabilities Education Act.

ARGUMENT

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IS CORRECT AND THIS CASE MEETS NONE OF THE CRITERIA ESTABLISHED BY THIS COURT FOR THE GRANTING OF A WRIT OF CERTIORARI.

This Court has recently issued a thorough, comprehensive opinion governing attorney fee litigation. *Farrar v. Hobby*, 506 U.S. ____, 113 S.Ct. 566, 121 L.Ed. 2d 494 (1992). Another opinion, so soon on the heels of *Farrar*, is unnecessary. The instant case has no precedential importance, nothing to add to *Farrar*, and no interest to anyone but the litigants. The case was of such little significance to the Court of Appeals that no opinion was written. None of this Court's criteria for granting certiorari are present. Additionally, this case would not be an appropriate one in which to answer issues which may have arisen in the wake of *Farrar*, since the plaintiff/parent in this case clearly meets the criteria set out in *Farrar*, and, therefore, no such issues exist.

Defendant's basis for requesting the writ is that it claims there is a conflict among the Courts of Appeals. The "conflict" for which Defendant searches simply does not exist. Defendant's attempts to demonstrate such a conflict between this case and *Brown v. Griggsville Community Unit School Dist. No. 4*, 12 F. 3d 681 (7th Cir 1993) fail upon closer examination. There are several major distinctions between the cases. In *Brown*, the plaintiffs achieved their goal simply by filing a due process request and waiting for over a year, during which time there was no contact between the parties. *Brown*, 12 F. 3d at 682. There was no decision or order by any Judge on the merits. In reality there was no litigation; in fact, the parents ***withdrew*** their request for a hearing shortly after a meeting of the child's IEP team was convened and an agreement was reached. *Id.* In this case, there has been extensive litigation and decisions at the administrative level, the District Court, the Court of Appeals, and the case is now before this Court.

A second distinction is that in ***Brown***, the decision that resolved the disagreement was made as provided by law at a meeting of the child's IEP team. In this case, the decision to settle the litigation did not take place in a meeting of the child's IEP team, but rather was a unilateral one made in a private discussion among members of the defendant's staff. The decision in this case was not made in a meeting required by the IDEA, and not by the IEP team as required by the IDEA. The IEP team meeting is required annually and the parents have a right to attend and be involved in the team's decision. 34 C.F.R. §300.343; 34 C.F.R. §300.344(a). Defendant's allegation that its decision to settle this case was made as part of a federally mandated meeting pursuant to 34 C.F.R. §300.343 is simply incorrect.

A third distinction between this case and ***Brown***, is that in ***Brown***, the progress of the student, which caused the parties to agree, was a matter of objective determination. ***Brown***, F.3d at 685. That is, in ***Brown***, the child's progress in school was measured by testing. It was therefore established that the child had made a measured amount of progress, and a certain placement was appropriate.

In this case, the alleged reason for the settlement of the case is subjective. There are no objective criteria which require placement at one school or another. The decision to allow the student to remain at TSD was, at best, an exercise of discretion by members of the defendant's staff. Plaintiffs dispute defendant's contention that the settlement of the case was due to a change in circumstances in mid-litigation. Plaintiffs contend that the same circumstances were evident from the beginning, and that the change of position was a legal maneuver intended to avoid payment of attorney's fees.

The instant case is also distinguishable from ***Brown*** in that, in ***Brown***, the school system made one reversal of position at an IEP meeting which rendered the case moot. In this case, the defendant has made a confusing series of position changes over a period of years. The defendant began by placing Raymond at TSD. In 1990, it changed its position, which led to the first

administrative hearing. In the midst of that proceeding, it changed its position and settled the case. In 1991 it changed its position again, triggering this case. In 1993 it changed its position again. The defendant has continually used the tactic of "changing position" as a legal maneuver.

Defendant sets out several other cases which have been decided before and after *Farrar*. These cases contain issues not present in the instant case, and have no bearing on the Court's consideration of the Petition.

This case was triggered when the defendant, over plaintiffs objection, proposed to change the placement of the student. At that time, plaintiffs had only two choices: (1) accept the defendant's decision; or (2) request a hearing. Plair.tiffs took the only option available to contest the decision. 20 U.S.C. §1415(b)(2).

When they were not satisfied with the due process decision, plaintiffs filed a complaint in the District Court. Again, this is what they were directed to do by Congress and the only choice available, other than to accept a decision with which they disagreed. 20 U.S.C. §1415(e)(2).

In the District Court, plaintiffs obtained the relief they sought. There is no suggestion that plaintiffs caused a delay or took inappropriate action. Plaintiffs suggest that it would be startling to any parent of a disabled child to find that she could follow proper procedure, achieve the result she sought, and not be the prevailing party.

Defendant's argument rests upon the notion that if a student's condition changes during litigation, in a way that favors the parent's position, the school system should be relieved of paying attorneys' fees, since, defendant argues, it is the change in the student, rather than the litigation which may tip the scales in favor of the parent. Defendant's notion, is of course, erroneous. These cases all deal with young children who are constantly changing. Some changes will favor the parent and some the school system. This is simply the natural course of litigation, not a reason to deny attorney's fees.

Defendant's statement that, "This unprecedented decision

represents such a departure from past Court practice and is so novel that this Court should exercise its power of supervision . . . ", Pet. at 23, is unwarranted. It is hard to imagine an easier case. Defendant's convoluted labyrinth of logic only attempts to complicate the obvious.

Defendant claims that, "... [a] judicial defining of the IDEA 'prevailing party' is needed . . .", Pet. at 13, and suggests that precedents under 42 U.S.C. §1988 have no applicability to IDEA cases. Defendant overlooks the holding of the Sixth Circuit Court of Appeals in a case in which this defendant was involved, *Krichinsky v. Knox County Schools*, 963 F. 2d 847 (6th Cir. 1992). The Court held that the legislative history of the Handicapped Children's Protection Act indicates that the term "prevailing party" is intended to have the same meaning as similar terms in other legislation. *Id.* at 849. Cases decided under 42 U.S.C. §1988, are applicable precedents to cases under the IDEA.

Defendant's theory compels the conclusion that it would have been impossible from the outset for the plaintiff/parent to have been the prevailing party. Defendant argues that it was the passage of time which caused it to "change its position". This compels the conclusion that plaintiffs' victory was inevitable, and therefore, defendant argues, the parent should not be considered the prevailing party. The flaw in defendant's theory is evident. Certainly Congress did not intend to pass an act providing for attorneys fees for parents who are the prevailing parties, in cases in which it would be impossible for the parents to be the prevailing parties. Defendant's argument that it alone has the right to decide, on a subjective basis, whether a child has changed sufficiently to justify the defendant's changing its position makes a mockery of the IDEA's fee shifting provisions.

Under the defendant's theory, a parent (like Ms. Rynes in this case) could expend thousands of dollars pursuing a winning case only to be left "holding the bag" after a school system change of mind. In fact, under the defendant's theory, parents with meritorious claims, whose positions would be most likely to be vindicated, would be the most likely to be denied attorneys fees.

The legislative history of the attorneys' fees provisions of the

IDEA is illuminating. The legislative history discloses that, "Congress' original intent was that due process procedures, including the right to litigation, . . . be available to all parents." Sen. Rep. No.99-372, 99th Cong., 1st Sess. 2 (1986). The defendant's proposed construction of the Act is contrary to this purpose.

Under defendant's theory, Ms. Rynes would suffer financially for exercising her rights. According to defendant, the only way this could have been avoided would have been for Ms. Rynes to have concluded at the outset that she could not afford to exercise her rights. If this Court were to adopt defendant's theory, poor parents would often have to conclude that they could not afford to exercise their rights under the IDEA. Such a chilling effect is directly contrary to the purposes of the Act.

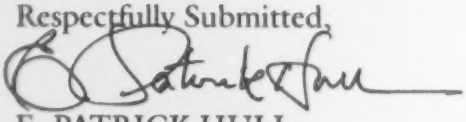
CONCLUSION

This case does not meet the criteria for the granting of a Writ of Certiorari. The reason defendant petitions this Court is that it disagrees with the decisions of the District Court and the Court of Appeals. The precedent which the defendant asks this Court to establish is contrary to common sense, prior cases and the letter and spirit of the Individuals with Disabilities Education Act. The petition should be denied.

Plaintiffs point out that since the District Court's award of fees and costs, they have been through an appeal to the Court of

Appeals for the Sixth Circuit and the preparation of this brief, and have incurred considerable additional expenses and fees. Plaintiffs ask that this Court remand this case to the appropriate Court for the awarding of additional fees and expenses.

Respectfully Submitted,



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